THE TREATY-MAKING POWER AND THE RESERVED SOVEREIGNTY OF THE STATES.

The Constitution of the United States provides in Article VI:

"This constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

If we take into account the length of the period during which the provision has been in force and the numerous conflicts between central and local sovereignty which have arisen under other provisions of the Constitution, it may fairly be said that disputes have been comparatively few in respect of the interpretation to be placed upon this provision of our organic law. True it is that early in its history, the Supreme Court, beginning with the case of *Ware* v. *Hylton,*[1] was called upon to determine the effect to be given to it in dealing with the private rights of aliens and citizens by virtue of treaties regularly passed. Recently, however, we have been confronted with the possibility of a serious controversy involving the interests and welfare of the entire Union, though ostensibly only between a foreign government and the Federal executive authorities on the one hand, and a State government, through one of its administrative departments, on the other.

A denial of access in the case of children of Japanese residents of San Francisco to the same schools frequented by the children of citizens and alien whites has brought to the subject of the treaty-making power of the President and Senate a great deal of attention. This is curious, as the question is, in the first instance, merely one of the interpretation of the Treaty of 1894. The constitutional validity of the treaty will probably never be questioned by the Supreme Court; first, because this function has always been distasteful to it from the time when, in 1796, Mr. Justice Chase stated that if the court did possess the power to declare a treaty void, it would never exercise it but in a very clear case indeed;[2] second, as a partial *sequitur* of the first, because the

[1](1796) 3 Dallas, 199.

[2]Ware *v.* Hylton, at p. 237.

right of residence guaranteed by the treaty with Japan will probably never be interpreted so broadly as to encroach upon the exercise of the purely administrative functions of the authorities of the State of California. This is especially true in view of the reservations contained in Article II of the treaty, in favor of "the laws, ordinances, and regulations with regard to * * * police and public security which are in force or which may hereafter be enacted in either of the two countries."[3]

It is not the purpose of this paper to discuss the merits of this controversy. In its present stages it is important only because it points out that the *limitations* upon the treaty-making power have never been authoritatively defined and that the precedents are so few as to leave the question an open one as to whether there are any limitations at all, other than those imposed upon the treaty-making power of most other countries. If, however, owing to the peculiar structure of our political system, such limitations do exist, it is plain that the consequences may be serious; for the Federal Government may either find itself incapable of maintaining the integrity of a compact regularly entered into with some foreign power for the benefit of citizens or subjects of that power residing or sojourning in the United States, or as a corollary, it may find that it is powerless to enforce reciprocal provisions protective of or beneficial to our own citizens residing or sojourning within the territory of that power.

An example of the first case was presented by the incident known as that of the Mafia Riots, which occurred in 1891, and which resulted in a withdrawal from Washington of the Italian Minister accredited to the United States. In that year, a number of Italians then confined in New Orleans were forcibly taken from jail and hanged by a large number of citizens. None of the participants was tried, though the then existing treaty (November 23d, 1871) guaranteed to the citizens of either nation in the territory of the other "the most constant protection and security for their persons and property."[4] Neither was any compensation possible under the laws of the State of Louisiana owing to the fact that the common civil law prevailed in that State pursuant to which no action lay for injury to a person, resulting in his death. Under the position taken by Mr. Blaine, then Secretary of State, the Federal Government was powerless to "do more than urge upon the State officers, the duty of promptly bringing the offenders to

[3]Compilation of Treaties in Force (pub. by U. S. Govt., 1899), p. 353.

[4]17 U. S. Stats. (Treaties) 49, 50, Art. 3.

trial."[5] This called forth a pointed reply by the Marquis Rudini in which he said:[6]

"We are under the sad necessity of concluding that what to every other government would be the accomplishment of simple duty is impossible to the Federal Government. * * * We have affirmed and we again affirm our right. Let the Federal Government reflect upon its side, if it is expedient to leave to the mercy of each State of the Union, irresponsible to foreign countries, the efficiency of treaties pledging its faith and honor to entire nations."

We think that the issue was thus very clearly brought out, but it was not settled at the time because, following the usual practice, the Federal courts evaded the question of the capacity of the treaty-making power to impress upon the laws of a State a provision within its police powers, and therefore otherwise reserved, in favor of aliens, in exchange for reciprocal benefits to our own citizens within the territory of the foreign state. Instead, the decision went off on a point of the interpretation of the treaty.[7] Furthermore, the Federal Government finally avoided further conflict with Italy by offering to her a sum of money to be distributed among the families of the victims, though the letter offering this indemnity disclaimed any liability on the part of the United States Government.[8]

That this stand was consistent with the position taken twenty years before by the State Department in prosecuting the treaty rights of American citizens against another federated system of government is questionable. In 1871, the steamer *Montijo* was seized by revolutionists while on a voyage to Panama and within the jurisdiction of that State, which was then a constituent State of the United States of Colombia. It is possible that a distinction may be found between the situation then created and that which existed at the time of the Mafia riots, owing to the fact that revolution was general in Colombia at that time. True it is, however, that the United States, in prosecuting the claim before the arbitration, maintained that the Federal Government of Colombia could not evade responsibility under the treaty for the failure of Panama to compensate the owners of the ship. In fact the arbitrator so held.[9]

[5]Foreign Relations, 1891, p. 685.
[6]Foreign Relations, 1891, p. 712.
[7]New Orleans *v.* Abbagnato (1894) 23 U. S. App. 533.
[8]Foreign Relations, 1891, p. 728.
[9]Moore, International Arbitrations, Vol. 2, pp. 1439-42.

These examples from the diplomatic relations of the United States with other powers are cited to show the situation presented by the peculiarity of our organic law. The war spirit which pervaded both countries at the time of the incident with Italy and the energetic measures employed in the President's recent message to Congress to quell a recurrence of it on either side of the Pacific because of the incident with Japan, indicate the importance of having a clear definition of the treaty-making power under our Constitution. A strongly centralized nation such as Italy or France, or as we have seen even our own government when in the position of the complainant, will never submit without a struggle to the avoidance of treaty obligations on the plea of *ultra vires*. Neither will the opportunist methods of diplomacy forever prove adequate. Mr. Blaine adopted the attitude of the overzealous attorney defending his client from a money claim for injuries and finally compromised on the best basis possible. This will not do, for, as the case of the *Montijo* proves, the shoe has been, and again may be, on the other foot.

But is the power of our treaty-making organs really limited to the extent as is still maintained by some? In determining this problem it will be to the purpose to review the most important cases which have thus far been decided by the courts, relative to the power of the President, "by and with the advice and consent of the Senate," to enter into treaty relations in derogation of the laws of a State.

The first important case which reached the Supreme Court did not relate to a treaty under the Constitution at all, but to one taken over from the régime of the Articles of Confederation. In *Ware* v. *Hylton*[10] a British subject sued citizens of Virginia on a debt contracted prior to the war; the defenses of the debtors were:—abrogation of the debt by war, confiscation by the State of Virginia as a war measure, and partial payment to the State as owner of the debt. The plaintiff replied, pleading the Treaty of Peace of 1783, and its authority as the supreme law of the land, under Article VI, quoted in the opening paragraph of this paper. Thus as early as 1796, a direct conflict arose between State sovereignty and the power of the Federal Government to encroach upon the same by virtue of its treaty-making powers. With only one dissenting opinion,[11] the Supreme Court established the author-

[10](1796) 3 Dallas, 199.

[11]The dissent of Mr. Justice Iredell did not relate to the power of the treaty-making authority to bind a State. In fact, the opinion con-

ity of the treaty over the constitution and laws of Virginia. The decision is direct authority for the proposition that the treaty, in effect, annulled the legislative act of Virginia. Quoting from the opinion of Mr. Justice Chase:

"There can be no limitation on the power of *the people* of the *United States*. By their authority, the State Constitutions were made, and by their authority the Constitution of the *United States* was established; and they had the power to change or abolish the State Constitutions, or to make them yield to the general government, and to treaties made by their authority. A treaty cannot be the *supreme law* of the land, that is of all the *United States*, if any act of a *State Legislature* can stand in its way."[12]

The weight of this decision cannot be underestimated, as the opinion was rendered when the debates in the Convention which framed the Constitution must have been fresh in the memory of the judges. In fact, one of them,[13] had himself been a member of the Constitutional Convention, and another,[14] a member of Congress and a signer of the Declaration of Independence.

This decision was followed a year later in a case involving similar questions and decided similarly, *per curiam*.[15] In *Fairfax* v. *Hunter*,[16] the court went even a step further. This case involved title to a large area of land then known as the Neck of Virginia, to which a British subject had received possession and seisin by devise from Lord Fairfax prior to the treaty of 1794 with Great Britain, which provided that British subjects and American citizens might grant, sell or devise lands in the country of the other contracting power "as if they were natives." Prior to this treaty the land might have escheated to Virginia by an inquest of office. This proceeding the commonwealth neglected to undertake, the legislature attempting to dispense with it by a statute passed after the date of the treaty. It will be seen that the devisee was possessed of the merest thread of title, yet it was held by the court to have been confirmed and rendered absolute by the treaty. The inchoate title of Virginia was, in the opinion of Justice Story, rendered ineffectual and void.

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firms it in terms quite as absolute as the majority opinion. He says that what was under the Articles a *moral obligation* became *supreme law* under the Constitution. *Id.* pp. 276-277.

[12] *Id.* p. 236.

[13] Mr. Justice Paterson.

[14] Mr. Justice Wilson.

[15] Clarke *v.* Harwood (1797) 3 Dallas, 342.

[16] (1813) 7 Cranch, 603. The opinion here was closely followed in Craig *v.* Radford (1818) 3 Wheat. 594.

This case was followed shortly afterward by *Chirac* v. *Chirac*.[17] John Marshall had in the meantime ascended the bench as Chief Justice. Curiously enough, he had been counsel for the defense in *Ware* v. *Hylton*, though, so far as reported, he did not attempt in his argument to weaken the scope of the treaty-making power. At all events there are no traces that his zeal as an advocate affected his views as a judge. A statute of Maryland providing for the escheat of estates acquired by aliens through descent unless conveyed to a citizen within ten years was held by him to be ineffectual to accomplish a forfeiture, owing to the French treaty of 1778. The treaty declared "that the subjects and inhabitants of the United States, or any one of them, shall not be reputed *aubains* in France," with reciprocal rights to French citizens. Notwithstanding that this treaty had been abrogated prior to the expiration of the ten years' term, the court held that the title had vested. In the words of Chief Justice Marshall:[18]

"If a treaty or any other law has performed its office by giving a right, the expiration of the treaty or law cannot extinguish that right. * * * the court is of the opinion, that the treaty had its full effect the instant a right was acquired under it; and that its expiration or continuance afterwards was unimportant."

The court thus gave to the treaty the effect of a statute repealing the law of Maryland, and under the well-known doctrine of statutory interpretation, the original statute was not revived *ipso facto* by the limitation of the repealing act.

This view has been constantly followed in this country, differing from the practice followed on the Continent of Europe, where treaties are regarded as contracts the execution of which must be demanded from, and is generally superintended by the executive of each nation. The force and effect of our constitutional provision was even more clearly brought out in 1840, in a case wherein the court declared that treaties, compacts and articles of agreement in the nature of treaties, to which the United States is a party, execute themselves by their own fiat, and have the same effect as an Act of Congress and are of equal force with the Constitution.[19]

More than eighty years after the decision in *Chirac* v. *Chirac*, the law of Virginia relative to the right of alien heirs to succeed to real estate remained practically the same as under the common

[17](1817) 2 Wheat. 259. *Accord:* Orr *v.* Hodgson (1819) 4 Wheat. 453; Hughes *v.* Edwards (1824) 9 Wheat. 489; Carneal *v.* Banks (1825) 10 Wheat. 181.

[18]Loc. cit. p. 277.

[19]Pollard *v.* Kibbe (1840) 14 Pet. 353, 412-415.

law. It was again held to be *abrogated* as to citizens of Switzerland by virtue of the treaty of 1855 with Switzerland.[20] Mr. Justice Swayne reviews the decisions already referred to and quotes at length from *Ware* v. *Hylton.*

Finally in 1889, Mr. Justice Field again confirmed these well-known doctrines in *Geofroy* v. *Riggs.*[21] The complainants were citizens of France and claimed to inherit real estate in the District of Columbia, from a citizen of the United States. The law of Maryland in force at the time of the creation of the Federal District permitted aliens to take and hold land by deed or will within the State, and to transmit them as though citizens, but did not do away with the disability of aliens to take lands by inheritance from a citizen of the United States.[22] However, the treaty of 1853 with France provided that where the existing laws permit aliens to hold property, they shall be permitted to enjoy the right of possessing it by the same title and in the same manner as citizens of the United States. In holding that this treaty must be read into the laws of the District of Columbia, Mr. Justice Field was simply following the unbroken chain of authority. But certain statements *obiter* point out certain limitations upon the treaty-making power and require our closer attention.[23]

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which the property may be transferred, devised or inherited, are fitting subjects for such negotiation. * * *

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The treaty power, as expressed in the Constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the States. It would not be contended that it extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent. *Fort Leavenworth Railroad Co.* v. *Lowe,* 114 U. S. 525, 541. But with these exceptions, it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

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[20]Hauenstein *v.* Lynham (1879) 100 U. S. 483.

[21](1889) 133 U. S. 258.

[22]Spratt *v.* Spratt (1828) 1 Pet. 343; (1830) 4 Pet. 393.

[23]133 U. S. 266-267.

Though this statement of the doctrine is too broad to satisfy the requirements of the States' Rights School, it may be urged that even the restraints enumerated by the learned jurist have never acquired the authority of established law at least so far as relates to conflict between the treaty power and the sovereignty of a State,—which is all that concerns us in the present discussion. On the contrary, the wording of the article expressly submits the organic law of each State to the treaty power. As we have already seen, this was recognized in the earliest case coming before the Supreme Court wherein it was held that as the people had the right "to change or abolish the State Constitutions," they could make them yield to the treaty power of the Federal government (Chase, J., *supra*).

As to the restraint in respect of a cession of State territory, it has been declared by no less an authority than Chancellor Kent that no such restraint exists. In the controversy between the United States and Great Britain, relative to the Northeastern boundary in 1842, a part of the territory claimed by the State of Maine was in fact included in the territory relinquished to Great Britain by the Webster-Ashburton Treaty. Daniel Webster, then Secretary of State, declared in the course of correspondence that the consent of the State was necessary, but in this he was in conflict with Chancellor Kent that the better opinion would seem to be that such a power of cession does reside exclusively in the treaty-making power under the Constitution "although a safe discretion would forbid the exercise of it without the consent of any State."[24] Mr. Justice Story was inclined to take the view that it might extend to some cessions and not to others, though no juridical basis is given us for his opinion.[25] The Supreme Court furthermore, in a case decided just two years prior, wherein Mr. Webster as counsel successfully maintained the wide range of the treaty power, confirmed a treaty with the Cherokee Indians apportioning to them part of the territory of North Carolina.[26]

The power to cede territory is without doubt an extreme prerogative, yet, from the point of view of international law, it is one of the attributes of the sovereignty of a nation and is frequently necessary to preserve the whole. It is quite as essential to sovereignty in a federal system as in any other.

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[24]Kent, Comm. pp. ** 167, 284.

[25]Story, Life of Joseph Story, II, 286-289, quoted in Moore's International Law Digest (1906) vol. V, p. 173.

[26]Lattimer *v.* Poteet (1840) 14 Pet. 4.

The decisions thus far cited have referred to treaties regulating the descent and tenure of property. Though distinctly a category of legislation otherwise reserved to the States, the courts of the several States have followed the lead of the Federal courts and have upheld the paramount authority of the treaty power.[27] Another class of treaties attempt simply to assure the security of alien estates by providing for the award of administration to the consul accredited from the country of which the deceased was a citizen or subject. These deal therefore with questions associated with the procedure of Surrogates' courts, a matter over which the State authorities are loath to admit a lack of exclusive power. The treaty provisions have, however, been recognized in most instances[28] though there have been exceptions to the rule. One at least was costly. In 1863 the United States was compelled to pay damages awarded by international arbitrators because the Surrogate of New York County, in violation of the treaty with Peru, failed to award administration upon the estate of a Peruvian citizen to the Peruvian consul, but instead granted it to the public administrator, resulting in a loss to Peruvian heirs.[29]

From the cases cited in the footnote it will be seen that whatever doubt was entertained in New York prior to 1863 as to the binding character of such a treaty provision has long since been dispelled. And yet a certain hesitation is still discernible in New York decisions to extend to treaty provisions of this nature their full effect under the interpretation usually given them by international usage. Thus in one case Surrogate Thomas interprets the word "intervene" as applied to the possession, administration and judicial liquidation of the estate of citizens of Argentine, as importing simply a "right to be heard with others who may assert demands or defences" and not as entitling the Consul to the *corpus* of the estate.[30] Though the validity of the treaty is not

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[27]Watson *v.* Donnelly (N. Y. 1859) 28 Barb. 653; Fellows *v.* Denniston (1861) 23 N. Y. 420; Wunderle *v.* Wunderle (1893) 144 Ill. 40; Opel *v.* Shoup (1896) 100 Ia. 420. In the last case, the argument of the States' Rights School is fairly presented and overruled. Cornet *v.* Winton (Tenn. 1826) 2 Yerg. 143; "Must the whole Union, because of the misconduct of one State be forced into a war?"

[28]*In re* Fattosini (1900) 67 N. Y. Supp. 1119; *In re* Lobrasciano, (1902) 77 N. Y. Supp. 1040; Wyman *v.* McEvoy (1906) 191 Mass. 276.

[29]*In re* Vergil, Moore's International Arbitrations, vol. IV. p. 4390.

[30]*In re* Logiorato's Estate (1901) 69 N. Y. Supp. 507. *Contra: In re* Lobrasciano (1902) 77 N. Y. Supp. 1040, in which Surrogate Silkman interpreted the word "intervene" as employed in the same treaty "according to the tendency of International Law" and not of State law and thus awarded administration to the consul of Argentine. Surrogate Thomas in the first case cited, himself admits "that a solemn treaty of the

questioned, the opinion refers to certain authorities of Louisiana, in which State the States' Rights theory for a time prevailed. It was said that this class of treaties would in effect create a federal probate jurisdiction which, under our system, was impossible; that

"the probate jurisdiction was not conferred by the people in their Constitution upon the general government, and ergo, it was reserved to the States and the people thereof respectively."

But the Supreme Court of that State has since given a quietus to this reasoning and has announced that it is "idle" to call into question the competence of the treaty-making power to give a direct representation to French subjects through the consul of their country.[31]

The power of the courts to "interpret" treaty provisions so as to make them consistent with the police or reserved powers of a State has been exercised on other occasions.[32] Without enumerating these in detail it is sufficient to say that as the general government is in the last instance responsible for the performance of its treaty obligations, a federal interpretation would seem indispensable. Indeed, in Article III of the Constitution which defines the scope of the Federal judiciary, cases arising under treaties are expressly enumerated.

Thus far our discussion has developed no distinction in respect of the class of treaties which shall have precedence over State law. We have seen that those dealing with the descent and tenure of property and with the security of alien estates, though within the categories of legislation otherwise reserved to the States, have long been safely entrenched as part of our supreme law. May it not reasonably be asked: if treaties can be passed dealing with *some* matters within the reserved category, why not as to *all?* Empirically, a possible distinction might be sought between treaties dealing strictly with the property rights of aliens and those assuring rights or privileges which are personal in nature. In considering the latter we approach nearer to the dispute current between the federal authorities and California relating to the Japanese.

United States with Italy is of binding force and that it must control all courts even to the extent of ousting them of jurisdiction or of changing the rules of their procedure."

[31]Succession of Rabasse (1895) 47 La. Ann. 1452, citing the earlier cases.

[32]See, for example, People *v.* Dibble (1857) 16 N. Y. 203, affirmed, (1858) 21 How. 366; Cantini *v.* Tillman (1893) 54 Fed. 969; Prevost *v.* Greneaux (1856) 19 How. 1, which is frequently cited in favor of the States' Rights view. Taney, C. J., delivers the opinion.

But even here we are not without precedent. Chinese immigration into California commenced in the later sixties, when there was a great demand for cheap labor. Afterwards when the hordes crossing the Pacific to supply this demand were considered a menace to the community and before Congress had passed the Exclusion Acts, the Pacific States attempted to control the situation themselves by local statutes. In order to restrict the employment of Chinese labor, the State of Oregon passed an act prohibiting the employment of Chinese laborers on public works. An attempt was made under this statute to enjoin a contractor from employing Chinese labor. The Federal Courts held[33] that

"the United States Courts had jurisdiction under the treaties between the United States and China, of 1858-1868; and that until abrogated or modified, these treaties were the supreme law of the land, and that the courts were bound to enforce them."

These treaties extended to the Chinese a right of access and of residence which the court held necessarily implied the right of living and to labor for a living, and that so far as the State was concerned, Chinese subjects had a right to enjoy all the privileges there of the most favored nation.[34]

The California Constitution of 1879 went even further than the Oregon statute, as it prohibited private corporations from employing Chinese labor. Under this provision statutes were passed making such employment a misdemeanor, and one Parrott was arrested for violating them. On writ of *habeas corpus* to the federal courts, Justice Sawyer discharged the prisoner, holding that the laws violated the treaty provisions, which were paramount. In a very able opinion he referred to *Ware* v. *Hylton* and the earlier decisions, and discussing Article VI of the Constitution said:[35]

"there can be no mistaking the significance or effect of this plain, concise, emphatic provision. The States have surrendered the treaty-making power to the General Government and vested it in the President and Senate; and when duly exercised by the President and Senate, the treaty resulting is the supreme law of the land, to which not only State laws, but State Constitutions are in express terms subordinate."

The Supreme Court of the United States, too, upheld the treaties with China, in so far as they were violated by a California statute, which, though not in terms, yet in effect, prevented the landing in California ports of Chinese women, regardless of their class.[36]

[33]Baker *v.* City of Portland (1879) 5 Sawyer, 566.
[34]*Id.* at p. 570. [35]*In re* Parrott (1880) 6 Sawyer, 349.
[36]Chy Lung *v.* Freeman (1875) 92 U. S. 275.

Again in the famous Queue case[37] decided in 1879 by Mr. Justice Field as Circuit Judge in San Francisco, it was decided that an ordinance providing that every person imprisoned in the county jail upon a criminal judgment shall have his hair clipped to the uniform length of one inch from the scalp, was not a necessary regulation for the care of convicts and was aimed strictly at a particular class in violation of treaty obligations. The court was astute in arriving at the real intent of the statute, and though realizing and in terms admitting the evil of Chinese immigration, referred the State authorities to the general government for relief:

"the State may exclude from its limits paupers and convicts of other countries, persons incurably diseased and others likely to become a burden upon its resources. It may perhaps also exclude persons whose presence would be dangerous to its established institutions. But there its power ends. Whatever is done by way of exclusion beyond this must come from the general government."

Much of the argument of the court in that case might well be considered applicable to the present dispute. Then as now the controversy was called into question by a municipal ordinance. Almost fatherly was the advice given by Mr. Justice Field to the people of his native State when he said:[38]

"nothing can be accomplished in that direction by hostile and spiteful legislation on the part of the State, or its municipal bodies, like the ordinance in question, legislation which is unworthy of a brave and manly people."

In respect of categories of legislation enumerated in the Constitution, there can be no dispute as between the authority of the treaty-making organs and the States. Here at most there may arise the question whether there has been a usurpation of the legislative powers of Congress. Though not within the limitations of the present paper, we may say that even as far back as 1840, Mr. Calhoun recognized that even the exclusive delegation of a power to Congress does not exclude it from being the subject of treaty stipulations. Of this the power of appropriating money furnishes a striking example. If the contrary should be maintained, it might truly be said that the exercise of the treaty-making powers has been "one continual series of habitual and uninterrupted infringements of the Constitution."[39]

Of all the movements toward centralization by construction

[37]Ho Ah Kow *v.* Nunan (1879) 5 Sawyer, 552.

[38]*Id.* pp. 563-564.

[39]Moore's Internatoinal Law Digest (1906) vol. 5, p. 164.

and interpretation, which have been progressing since the formation of the Federal Union, none would seem more necessary for the preservation of the whole than the tendency toward a liberal construction of Article VI of the Constitution. Even in the Convention, the necessity for the widest delegation of these powers was recognized. Madison pointed out that the violation by the States, as separate entities, of treaties passed under the old Articles of Confederation had already resulted in complaints from almost every nation with which treaties had been formed.[40] It is plain from the discussion which ensued that the provision was adopted in its present form in order to prevent any part of the nation from causing a rupture between a foreign nation and the whole. It is significant that after a full discussion in the Convention, the only restraints placed upon the treaty-making power were as to the method in which treaties must be made and ratified, and that those restrictions related only to the method of exercising the power and not to its scope or supremacy.[41]

From the very nature of our government, the treaty-making power must reside centrally or nowhere. If there be a limitation upon the power of the President and Senate to enter into a particular treaty, the power of the entire nation has been by so much cut down.

For all practical purposes of negotiation with a foreign nation, there is no residue of such power left anywhere. Adopting the reasoning of Mr. Butler, now Reporter of the Supreme Court of the United States, we may say that as to those subjects over which it was neither proper nor practical for a State to exercise sovereignty, but which required national action for the joint or equal benefit of every State, it was impossible for any State separately, or all the States collectively, either to delegate or reserve elements of sovereignty which none of them possessed.[42]

Whatever may have been the intention of the framers of the Constitution in respect of the reserved powers of the States within the category of national or State law, it could never have been (and the debates in the Convention so prove) to limit the central government in the exercise of its international power as a sovereign to protect and benefit the citizens of *all* of the States in foreign countries, and for that purpose, to assure reciprocal rights to aliens

[40]Madison Papers, vol. II, p. 896; Butler, Treaty-making Power of the United States, vol. I, p. 307.

[41]*Id.* p. 332.

[42]*Id.* vol. I, pp. 34-35.

in all of the States. It is clear that as a practical matter the one power follows as a corollary of the other. If it has the power to obtain the *right* in behalf of our own citizens, it has the power to pledge the faith and honor of the nation for the performance of the *quid pro quo* as an *obligation* upon all of the States. If it be said that thus a treaty may be made the subterfuge for imposing undesired legislation upon the States, it may be answered that besides the numerous political checks provided for in our system, the Supreme Court has ample authority to review the exercise of the constitutional prerogative just as it does in respect to an excess by Congress and the President, in the exercise of one of the expressly delegated powers.

But with these exceptions, the unrestricted exercise of the treaty power is essential to the Central Government as representing the nation and its sovereignty over and against foreign nations. It is wholesome because it tends to prevent war. It is consistent because Article I, Section 10, expressly denies all treaty power to the States without the consent of Congress and further because all of the States are equally represented in the ratifying body, wherein two-thirds must concur. International, not municipal standards of law should determine its scope and the limitations of its use.

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